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No. 02-

IN THE

# Supreme Court of the United States

VILLA MARIA NURSING AND REHABILITATION CENTER, INC.,

*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In this case, the Eleventh Circuit enforced an order of the National Labor Relations Board pertaining to alleged unfair labor practices but refused to exercise jurisdiction over that portion of the Board's order which directed a second election in the representation case that was consolidated with the unfair labor practice case and treated as a single case for all purposes by the Board. The questions presented are:

1. Whether the Eleventh Circuit lacked jurisdiction to review that portion of the Board's order which pertained to the direction of a second election where the Board held a consolidated hearing and treated the representation case as inextricably interwoven with the underlying unfair labor practice case involving the same parties, same allegations, and same evidence.

2. Whether the Eleventh Circuit properly determined that there was substantial evidence in the record as a whole to support the Board's order as it pertained to the unfair labor practice case.

## PARTIES TO THE PROCEEDING

All parties are listed in the caption, except that the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC, a party to the proceedings before the Board, was allowed by the Eleventh Circuit to intervene in the appeal. The Service Master Company was a party to the proceedings before the Board, but did not participate in the appeal.

## STATEMENT PURSUANT TO RULE 29.6

Petitioner, Villa Maria Nursing and Rehabilitation Center, Inc. does not have any parent corporation, nor does it have any publicly-traded stock. Petitioner is a not-for-profit corporation under Section 501(c)(3) of the Internal Revenue Code. The Archdiocese of Miami is a sponsor of and has a controlling interest in Petitioner.

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Petitioner ("Villa Maria") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The decision and order of the National Labor Relations Board ("Board") adopting the Administrative Law Judge ("ALJ")'s rulings, findings and conclusions, along with the ALJ's findings of fact, conclusions of law, and recommended order, is published at 335 N.L.R.B. No. 99 (Appendix ("Pet. App.") 5a-54a). The order rendered by the court of appeals as to jurisdiction (Pet. App. 3a-4a) is not published. The court of appeals' opinion enforcing the Board's order and denying the petition for review (Pet. App. 1a-2a) will be published only in table format in the Federal Reporter.

## STATEMENT OF JURISDICTION

The court of appeals entered its opinion and judgment on September 12, 2002. Villa Maria invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

This case presents important issues regarding the proper administration of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("the Act"), and the scope of appellate review over orders rendered by the Board under the Act. In this case, in addition to its erroneous view of the evidence, the Board refused to follow its own rules and precedents and condoned a result which deprived Villa Maria of basic due process. The court of appeals held that it was powerless to remedy

the Board's acts because of an alleged lack of jurisdiction. However, there is nothing in the Act which deprives a court of appeals of jurisdiction (and the practical realities favor review) where the Board draws no distinction between the representation and unfair labor practice cases and treats the two as inextricably interwoven. The court of appeals abdicated its responsibility to provide meaningful review of the Board's order and condoned the Board's result-oriented decisionmaking.

1. Villa Maria is an employer of a unit of employees who sought representation by intervenor below, Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC ("Union") (the "R" case). At the same time, the Union also sought to organize certain employees of another employer, Service Master Company ("Service Master"), who worked at Villa Maria's facility under a contract between Villa Maria and Service Master. After each employer prevailed in separate elections held on the same day, the Union filed a single set of objections to the "election."

The Union filed an unfair labor practice charge against both Villa Maria and Service Master (the "C" case), which included many of the same allegations that were made in its election objections and which, again, failed to delineate which entity allegedly was responsible for the conduct charged.[1]

Villa Maria moved to dismiss the objections and the charge on the grounds that no valid objections had been filed

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1. Both the election objections and the unfair labor practice charges were dismissed as to Service Master, neither of which rulings were challenged before the Board or appealed.

by the Union as to the Villa Maria election and that the charge failed to provide sufficient notice to Villa Maria. The Board ignored Villa Maria's motions and ordered a consolidated hearing as to the "R" case and the "C" case. Villa Maria had little choice but to appear and defend, even though it was not sure what it was defending itself against. Despite the fact that the hearing pertained to two distinct cases over which there are different standards of appellate review, the Board treated the two as indistinguishable.

2. With regard to the allegation that Villa Maria engaged in surveillance by watching Union organizers hand out leaflets, the ALJ credited Villa Maria's evidence that threats (including to kill Administrator Jack Rutenberg and Engineering Supervisor George Miraglia) and vandalism (both inside and outside the facility) had occurred during the Union campaign, that Union organizers had trespassed onto Villa Maria's property, and that Union organizing activity impeded vehicular traffic (including ambulances) from entering and leaving the property. Rejecting the Union's evidence as to a greater number of guards and months in which they allegedly were present, the ALJ found that Villa Maria increased its security complement from one to two guards only during the last two weeks of May and that it had legitimate reasons for taking this action to protect its patients, staff, and property rights. Nonetheless, the ALJ went on to find an unfair labor practice because Villa Maria engaged in "continuous scrutiny" rather than "mere observation" during those last two weeks of the campaign. Pet. App. 32a-39a.

After rejecting all direct evidence that Villa Maria threatened loss of benefits if the Union won the election, the ALJ found that Villa Maria's distribution of an employee

satisfaction survey during the Union campaign was unlawful because it contained an implied promise to remedy grievances, even though the same survey was distributed at sister facilities where no Union organizing was taking place and there was absolutely no evidence in the record other than the survey itself that this was Villa Maria's intent or that the survey actually was perceived by employees in this way. With regard to the implementation of casual day and an offer of prizes in conjunction with a pre-planned CNA week celebration, the ALJ again found that the mere timing of these occurrences justified finding a violation, notwithstanding the absence of any evidence showing that these actions were intended to sway votes away from the Union. Pet. App. 39a-43a.

The ALJ determined that no election objections had been filed with regard to Villa Maria, instead concluding that the Union clearly intended to file objections *only against Service Master*. Pet. App. 46a-48a. Nonetheless, the ALJ went on to opine that "[i]n the event, however, that the Board should find that the objections were validly filed against Villa Maria," then the occurrence of unfair labor practices during the critical period would require a new election for Villa Maria's employees. Pet. App. 48a. Naturally, Villa Maria had no way of knowing whether the Board would adopt the ALJ's alternative findings on this issue, so it was forced to file "conditional" exceptions in the "R" case to avoid any waiver of its rights. However, having prevailed in the "R" case, Villa Maria had no reason to file exceptions in that case. Villa Maria did file exceptions in the "C" case. The Union did not file exceptions in either case within the time allotted by the Board's rules.

3. The Board has promulgated Rules and Regulations detailing the proper procedures for election challenges. One such Rule is that an aggrieved party must file election objections in order to challenge the result of an election and that such objections must be filed within a certain number of days or they are waived. 29 C.F.R. § 102.46. The Board's Rules also require that an aggrieved party file exceptions to the rulings of the ALJ within a certain time period or any exceptions are waived. 29 C.F.R. § 102.48. In the absence of exceptions, the Act provides that the ruling of the ALJ is adopted *automatically* as the ruling of the Board. 29 U.S.C. § 160(c).

The Union failed to file objections to the Villa Maria election (as found by the ALJ) and failed to file exceptions to the ALJ's ruling, even though the Union had sought an extension of time to file exceptions. Instead, the Union filed "cross exceptions" in the "R" case to Villa Maria's exceptions filed in the "C" case. Villa Maria moved to strike the "cross exceptions," which in actuality were exceptions filed out of time by the Union, but the Board denied Villa Maria's motion because the ALJ issued "one decision that encompassed allegations relating to both the unfair labor practice case and the representation case" (Board's letter ruling on motion to strike, dated March 21, 2001). Thus, the Board expressly recognized that the two cases were inextricably linked together so much so that the filing of cross-exceptions in one (the "C") case was deemed sufficient to allow the filing of exceptions under the guise of "cross-exceptions" in the other ("R") case. Essentially, there were not two cases, but only one.

The Board expressly relied upon the Union's "cross-exceptions" to reject the ALJ's conclusions with regard to

the Villa Maria election. Pet. App. 8a. Commenting on the Union's "instances of arguably inartful or mistaken grammar" (*id.*), the Board found that the Union intended to file objections against Villa Maria, as shown through its inclusion of Villa Maria in the caption of the document, its service of the objections on Villa Maria, and that the allegations in the objections closely matched allegations contained in the charge which subsequently was filed against Villa Maria. The Board also noted that the issues had been fully litigated in a consolidated hearing. Pet. App. 8a-9a. With regard to the merits of the "C" case, the Board agreed with the ALJ in all relevant respects with only brief discussion in a footnote to address issues raised by a dissenting Member. Pet. App. 5a-6a. The Board moved in the court of appeals to enforce its order and Villa Maria filed a cross-petition for review.

4. The court of appeals had jurisdiction to review the Board's Order under 29 U.S.C. § 159(d) and 29 U.S.C. § 160(e)-(f). The court *sua sponte* raised the issue of its jurisdiction over that portion of the Board's order which directed a second election based on Villa Maria's alleged unfair labor practices during the critical period and, after briefing by the parties, dismissed the appeal as it pertained to that portion of the Board's order. Pet. App. 3a-4a. The basis for the court of appeals' ruling on jurisdiction was a citation to a single case, *Custom Recovery, Div. Of Keystone Resources, Inc. v. NLRB*, 597 F.2d 1041, 1046 (CA5 1979). Pet. App. 4a. The cited page of that opinion states that "an order directing an election in a representation proceeding is not a final order directly reviewable by this court under sections 10(e) and (f) of the Act." *Id.* No other authority or argument was cited by the court of appeals in denying jurisdiction in the "R" case. The court of appeals' opinion on the merits of the "C" case was almost as brief, commenting

in a single paragraph that the Board's findings "are supported by substantial evidence, and the principles of law applied by the Board to those facts are well settled. The Board's order is, accordingly, ENFORCED and the Company's cross-petition is DENIED." Pet. App. 2a.

5. This petition for a writ of certiorari followed.

## REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons. First, the court of appeals erroneously determined that it lacked jurisdiction over the "R" case where the Board ordered a consolidated hearing over identical issues raised in both the "R" case and the "C" case and treated the two cases as inextricably linked for all purposes. The court of appeals' failure to exercise review over the Board's order in its totality condoned a violation of Villa Maria's due process rights and allowed the Board to ignore its own rules and precedents and render a decision which violated the Act. Second, the petition should be granted because the court of appeals failed to provide any meaningful review of the Board's order, which was not supported by substantial evidence in the record as a whole.

## I. THE COURT OF APPEALS HAS JURISDICTION TO REVIEW A BOARD ORDER CONCERNING REPRESENTATION AND UNFAIR LABOR PRACTICE ISSUES WHERE THE BOARD ORDERED A CONSOLIDATED HEARING AND TREATED THE TWO CASES AS ONE INEXTRICABLY LINKED CASE AND WHERE A FAILURE TO DO SO WOULD CONDONE A VIOLATION OF DUE PROCESS AS WELL AS A VIOLATION OF THE ACT

The ability to obtain effective appellate review of Board orders is essential to the proper functioning of the Act and to the preservation of basic due process. 29 U.S.C. § 160(f) provides that the courts of appeal may review "a final order of the Board granting or denying in whole or in part the relief sought" by any person aggrieved by such an order. In addition to the fact that the just-cited provision does not expressly address the issue of what is and what is not a final order, the Act does not contain any express provision denying appellate review of "R" case orders. Villa Maria was aggrieved by the Board's September 26, 2001 order and sought review of it. The Board had completed its labor with regard to the issues in both the "R" case and "C" case and its order was the Board's final word on these issues after a consolidated hearing.

Notwithstanding the lack of a prohibition in the Act, the court of appeals ruled that there is no appellate review of representation orders of the Board, except in the context of reviewing a subsequent unfair labor practice proceeding. Pet. App. 4a (citing *Custom Recovery, Div. Of Keystone Resources, Inc. v. NLRB*, 597 F.2d 1041, 1046 (CA5 1979); *See also NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418,

1422 n.2 (CA11 1998) (court lacks jurisdiction to review Board decisions in representation matters; applied to Board-ordered recount of ballots). In *Custom Recovery*, the court of appeals refused to vacate that portion of the Board's order which directed a second election. Significantly, after that refusal, the employer moved the Board to vacate its prior decision and to certify the results of the first election which the union had lost. The Board granted the motion, severed the representation and unfair labor practice cases, vacated its direction of second election, and certified the results of the first election. *Custom Recovery, Div. Of Keystone Resources, Inc.*, 245 N.L.R.B. 512 (1979). This, of course, was the only action the Board could take which was consistent with the court of appeals' opinion.

### A. The Act does not Prevent Review of Representation Orders in all Circumstances and the Practical Realities of Board Litigation Favor Review in Consolidated Cases

Supposing that Villa Maria was successful in obtaining review and the court of appeals (like it did in *Custom Recovery*) finds that the Board's conclusions as to the alleged 8(a)(1) violations were erroneous, there will be no need for a second election because the first one would have been effectively ruled valid. There is no reason to wait for a Section 8(a)(5) unfair labor practice proceeding as a vehicle for reaching the same result. This would only increase the delay and expense to all parties, a significant factor in this case where the election was held in May 1996. In fact, the Board already has ruled on the unfair labor practices after a consolidated hearing in the two cases. Having chosen to treat the two cases as inextricably linked for all purposes, the Board should not be allowed to now claim that a statutory

distinction exists between the "R" case and the "C" case so that jurisdiction is only available for the court of appeals to review the "C" case and not the "R" case.

At least one federal judge has adopted this reasoning. *See Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534 (CA3 1983) (Garth, J., dissenting). In that case, even the majority recognized that since the court already had passed on the Board's decision and rejected its conclusion that two minor 8(a)(1) violations tainted the election won by the employer, "considerations of efficiency and judicial economy seem to suggest that we review the election order as well." 697 F.2d at 543. However, the majority reasoned that it could not do so based on "the statutory restriction on our jurisdiction." *Id.* To the contrary, as Judge Garth cogently pointed out in his dissent, nothing in the Act prevented the court from exercising jurisdiction to review the Board's order directing a second election. *Id.* at 546 (Garth, J., dissenting). Instead, the "judicial gloss" placed on the statute by cases holding that no review of representation orders can be had was not warranted and defies reason and common sense in a case where the court disagrees with the Board's conclusions and refuses to enforce its order, thus nullifying the Board's accompanying order for a second election. As Judge Garth added,

> [t]he moment that the unfair labor practices, which provide the foundation for a new election, crumble because they are found not to be legitimate, the Board's accessory order for the second election must necessarily fall as well. Thus, treating or regarding the Board's order for a new election as a separate and discrete order which must carry the weight of finality of and by itself in this context, exalts form over substance.

697 F.2d at 547 (Garth, J., dissenting). Moreover, since the Board's orders on the unfair labor practice and election issues are "inextricably bound together" (especially where a consolidated hearing is held and the Board has treated the "R" and "C" matters as a single case), the orders should be considered one "final order" which is reviewable by the court of appeals. *See id.* at 549 (Garth, J., dissenting). Allowing a perceived distinction between the "R" case and the "C" case where the Board has not drawn one interferes with efficient review of Board orders and considerably increases the delay and expense of litigating matters under the Act. Nothing in the Act requires this course of events and the court of appeals should not have held to the contrary.

### B. The Failure to Review the Board's Order in this Consolidated Case would Condone a Due Process Violation and a Violation of the Act

Initially, the Board should not have reached the issue raised by the Union in its "cross exceptions" because that issue was waived when the Union failed to timely file exceptions to the ALJ's decision, which became the order of the Board *automatically, as a matter of law,* under 29 U.S.C. § 160(c). Under the plain language of the Act, there is nothing the Board should have been able to do to "save" the Union's exceptions. However, the court of appeals' ruling on jurisdiction means that the Board's failure to adhere to its own rules and enforce the Act in the "R" case are matters which are not reviewable by the court of appeals even though the identical issues are presented in the "C" case over which the court indisputably has the power to review.

With regard to the Board's rationale for rejecting the ALJ's conclusion, the caption and fact of service on both

Villa Maria and Service Master cannot reveal the Union's intent because there undoubtedly were two separate elections but only one "R" case. Under Board Rule (29 C.F.R.) § 102.69(a), it was the responsibility *of the Regional Director*—not the Union—to serve the objections on all parties to the proceeding (which included Villa Maria), thus any service by the Union on Villa Maria was merely a "courtesy copy" as found by the ALJ. In addition, the filing of unfair labor practice charges against Villa Maria which substantially mirrored the election objections cannot support the Board's conclusion because the charges were filed *subsequent to the objections* and could not *nunc pro tunc* cure any defects in the objections.

Board precedent is quite strict with regard to the filing of objections, which have been dismissed when they are even one day late. *See Wilson-Sinclair Co.*, 191 N.L.R.B. 341 (1971) (telegram to Board stating that Union hereby protests "certain activities" of the employer held insufficient objections when specific grounds were not supplied until several days later); *Sig Wold Storage & Transfer, Inc.*, 205 N.L.R.B. 378 (1973) (objections rejected where received by Western Union for delivery on due date but were not delivered to Regional Office until next day); *North Star Steel Co.*, 282 N.L.R.B. 252 (1988), *enf. granted*, 1989 U.S. App. LEXIS 13617 (CADC 1989) (objections rejected where counsel gave objections to process server on due date but process server went to wrong building and objections were not received until following day). With such severe penalties levied for arguably minor procedural flaws, one would expect the Board to reject objections which did not even clearly reference the entity to which they are directed.

The Union's lack of specificity was more than just a procedural technicality. Parties who appear before the Board are entitled to due process of law, just as in other legal proceedings. Thus, numerous cases have refused to enforce Board orders where due process was not afforded. *See, e.g., Lotus Suites, Inc. v. NLRB*, 32 F.3d 588 (CADC 1994) ("boilerplate" unfair labor practice charge which lacked specific factual allegations held insufficient notice to employer); *NLRB v. H.P. Townsend Manuf. Co.*, 101 F.3d 292 (CA2 1996) (enforcement denied where party was not served with complaint even though he had actual knowledge of allegations); *Central Transport, Inc. v. NLRB*, 997 F.2d 1180 (CA7 1993) (denying enforcement of bargaining order as to party not named an employer in representation proceeding where Union was aware of relationship between entities).

In this case, Villa Maria was put in the untenable position of having to respond to the allegations in the "C" case at the consolidated hearing while also maintaining its defense that no valid election objections had been filed against it, thus requiring no response with regard to the same allegations in the "R" case. Due process requires not only fair notice, but also a meaningful opportunity to prepare and present evidence. In fact, as the court stated in *NLRB v. IWG, Inc.*, 144 F.3d 685, 688-89 (CA10 1998):

> Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law.

Villa Maria was denied its due process rights where it had no meaningful opportunity to prepare its defense. Villa Maria did not waive its rights or consent to litigate by appearing at the consolidated hearing as it had no choice. *See NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 734 (CA7 1983) ("[d]ue process is not satisfied by giving respondent a mere opportunity to question witnesses without a prior opportunity to prepare a meaningful defense"). Villa Maria was prejudiced by the Union's failure to file proper objections, a failure which easily could have been remedied or avoided with minimal effort. The Union chose which of two employers it wanted to file objections against. It should have been held responsible for the consequences of that choice.

## II. THE COURT OF APPEALS FAILED TO EXERCISE SUFFICIENT REVIEW OVER THE BOARD'S ORDER AND ENFORCED AN ORDER WHICH WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE

The brevity with which the court of appeals dispatched Villa Maria's arguments relating to the "R" case is matched by the short shrift given to its arguments in the "C" case. Despite precedent in which the court of appeals has criticized "rubber stamp" review of "boilerplate" Board orders and Board decisions which misconstrue or fail to consider important evidence; *see, e.g., Dow Chemical Co. v. NLRB*, 660 F.2d 637 (CA5 1981) and *Northport Health Services, Inc. v. NLRB*, 961 F.2d 1547 (CA11 1992); the court's opinion in this case offered no substantive rationale for the result reached and upheld a decision based on hearsay, speculation, and inference which was not supported by substantial evidence in the record or the applicable law. Therefore, review is appropriate to reverse the decision.

With regard to the alleged surveillance of openly-occurring Union organizing activity, despite finding that Villa Maria had legitimate reasons for increasing its security contingent from one guard to two during the last two weeks of the campaign in response to serious threats, vandalism, unlawful trespass, and the presence of traffic hazards created by the Union's activity, the Board went on to find a violation of the Act based on its perception that Villa Maria's conduct crossed the line from "mere observation" (which is permissible) into "continuous scrutiny" (which is not). This conclusion was based, not on the cumulative weight of the evidence, but on isolated pieces of testimony riddled with hearsay and speculation that the security guards were joined in their observation by two other employees of Villa Maria (George Miraglia and George Saenz), that security guards encroached too closely to the Union organizers, and that security guards wrote something down on notepads.

No Union witness testified from their own personal knowledge that he or she knew who George Miraglia or George Saenz were. Instead, Union organizers testified that they had "been told" (invariably by someone who was not identified and who did not testify) that the man who appeared outside during Union leafletting was Miraglia or Saenz. There was no credible evidence as to the amount of time Miraglia and/or Saenz spent watching Union organizing activity, no evidence that Miraglia or Saenz had a confrontation with Union organizers or encroached closely to where they were leafletting, and no evidence that Miraglia or Saenz interfered with the Union's efforts in any way. There was no evidence as to the alleged instructions given by Miraglia or Saenz to the security guards, other than through hearsay testimony. Instead, the cumulative effect of the testimony on this issue was that Miraglia and/or Saenz

made "spot checks" on the Union's organizing activity to make sure that property boundaries were respected, that traffic flowed in and out of the parking lot, and that all areas were secure, all legitimate reasons for observing Union activity, as found by the Board. There was no testimony establishing that the observation was "continuous" to the extent that anyone could have been intimidated by it. To the contrary, several employees (including the Union's own witnesses) testified that they were aware of the threats and vandalism, as well as the frequent presence of local police to deter trespassing and the creation of traffic hazards.

The Board cited isolated testimony in which a Union organizer testified that a security guard came within close distance. However, this evidence did not establish the frequency with which these occasions occurred. In addition, the substantial evidence in the record established that there were legitimate reasons for the close proximity on those few occasions (e.g., to tell the Union organizer he or she was trespassing on Villa Maria property or to carry on casual conversation). There certainly was nothing intimidating in these actions and no employee testified that there was. With regard to the note-taking by security guards, the record clearly established that accreditation standards required the guards to record the license numbers of vehicles which went into certain areas and the only security guard who testified at trial confirmed this. None of the Union witnesses saw what was written on the notepads and, thus, could not rebut Villa Maria's justification for the notes. The record as a whole revealed legitimate reasons for observing Union activity and failed to support the Board's conclusion of unlawful surveillance.

The Board concluded that Villa Maria's employee satisfaction survey violated Section 8(a)(1) because it was distributed after Villa Maria had notice of Union organizing activity and was "unprecedented and previously unannounced." Pet. App. 6a n.2. However, the mere fact that such surveys had not been done in the past did not establish that the survey was intended to dampen Union support or promise anything to employees. In fact, there was no testimony on these particular issues. In addition, the Board noted there was no "contemporaneous explanation" for the timing of the survey, but the only individual who testified on the issue stated that the timing was the result of a decision by Catholic Health Services ("CHS") to distribute the survey at all the facilities under its supervision, including Villa Maria. The implementation of casual day and prizes in conjunction with CNA week also were cited as violations because they constituted new benefits, but again the only testimony on the issue came from Villa Maria and justified these actions by pointing out that they occurred not only at Villa Maria but at all CHS-run facilities. If Villa Maria had not offered them whereas other non-Union facilities managed by CHS did, the Union undoubtedly would have cited *this* as an unfair labor practice.

The Board also adopted the ALJ's conclusion of a violation based on adverse inference, rejecting the testimony of the employee (Villa Louis) who stated that a labor consultant hired by Villa Maria threatened loss of benefits if the Union lost the election, but nonetheless finding a violation based entirely on adverse inference because Villa Maria did not call a rebuttal witness. Louis testified that John Davis, an individual she knew from a prior employment at a Union facility, made the threats. Villa Maria called Davis, who denied the threats and who was credited by the ALJ.

However, reasoning that Villa Maria should have divined that Louis meant to say Robert Mullen (Davis' partner) and, accordingly, should have called Mullen, too, to deny the remarks, the ALJ relied on adverse inference to establish the violation. Significantly, the ALJ did not credit Louis' testimony on this or any other issue. Instead, he clearly based his conclusion *solely* on adverse inference from Villa Maria's failure to call Mullen to deny remarks he was not alleged to have made, a failure which the dissenting Board Member called "entirely explainable." Pet. App. 19a.

The Board adopted the ALJ's findings and conclusions with regard to other more minor issues, none of which provided a basis for overturning the election. In sum, any thorough review of the evidence in the record as a whole should have revealed that substantial evidence did not exist for any of the alleged unfair labor practice violations found by the Board and that the election results of the May 1996 election should be certified. The court of appeals' failure to conduct an appropriate review and to reach this conclusion creates a manifest injustice that should be remedied by this Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ENFORCING BOARD'S ORDER AND DENYING COMPANY'S CROSS-PETITION FOR REVIEW DATED AND FILED SEPTEMBER 12, 2002**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 02-10743
Non-Argument Calendar

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NLRB Nos. 12-CA-18137 & 12-RC-7957

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

UNITE! UNION OF NEEDLETRADES INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-CIO/CLC,

Intervenor,

versus

VILLA MARIA NURSING AND REHABILITATION CENTER, INC.,

Respondent-Cross-Petitioner.

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

(September 12, 2002)

*Appendix A*

Before TJOFLAT, CARNES and HULL, Circuit Judges.

PER CURIAM:

Upon consideration of the record in the light of the parties' briefs in this case, we conclude that the Board's order should be enforced and that the Company's cross-petition for review should be denied. The findings of fact relied on by the Board in concluding that the Company violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), are supported by substantial evidence, and the principles of law applied by the Board to those facts are well settled. The Board's order is, accordingly, ENFORCED and the Company's cross-petition is DENIED.

SO ORDERED.

**APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT REGARDING JURISDICTION DATED AND FILED MAY 21, 2002**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10743-FF

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

versus

VILLA MARIA NURSING AND REHABILITATION CENTER, INC.,

Respondent-Cross-Petitioner.

Application for Enforcement of an Order of the National Labor Relations Board

Before BLACK and WILSON, Circuit Judges.

BY THE COURT:

The National Labor Relations Board ("the Board") filed an application for enforcement of its September 26, 2001, order adopting the Administrative Law Judge's order requiring the respondent to cease and desist from committing numerous unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C. § 151 et seq., and setting aside the representation issue and directing a new union

election as to a specified group of employees. The respondent filed a cross-petition for review to set aside the Board's order. To the extent the appeal challenges the portion of the Board's September 26, 200[1], order that adopted the Administrative Law Judge's finding as to unfair labor practices, the appeal MAY PROCEED. *See* 29 U.S.C. sec 160(e) and (f). To the extent it is a challenge to the Board's direction to conduct a new election for certain employees, this appeal is DISMISSED for lack of jurisdiction. *Custom Recovery, Div. of Keystone Res., Inc. v. National Labor Relations Bd.*, 597 F.2d 1041, 1046 (5th Cir. 1979).

## APPENDIX C — NATIONAL LABOR RELATIONS BOARD DECISION, ORDER, DIRECTION OF SECOND ELECTION, AND CERTIFICATION OF RESULTS OF ELECTION DATED AND FILED SEPTEMBER 26, 2001

**Villa Maria Nursing and Rehabilitation Center, Inc. and The Service Master Company *and* UNITE! Union of Needletrades, Industrial and Textile Employees, AFL-CIO/CLC.**

Cases 12-CA-18137 and 12-RC-7957

September 26, 2001

DECISION, ORDER, DIRECTION OF SECOND ELECTION, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On January 5, 2001, Administrative Law Judge Benjamin Schlesinger issued the attached decision. Respondent Villa Maria Nursing and Rehabilitation Center, Inc. (Villa Maria) filed exceptions and a supporting brief. The Charging Party Union filed an answering brief, cross-exceptions, and a supporting brief. Villa Maria filed answering and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm

the judge's rulings, findings,[1] and conclusions,[2] except as discussed below, and to adopt the recommended Order.

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1. Respondent Villa Maria and the Charging Party Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Contrary to our dissenting colleague, we would not reverse the judge's credibility resolutions supporting his finding that the Respondent violated Sec. 8(a)(1) by threatening employee Villa Louis. Our review of the record in accord with *Standard Dry Wall* does not convince us that the judge's credibility resolutions concerning the testimony of Louis were incorrect, or that the adverse inference drawn by the judge concerning the Respondent's failure to call Robert Mullen was inappropriate.

2. Contrary to the dissent, we agree with the judge's conclusion that the Respondent's distribution of an unprecedented and previously unannounced survey of employee working conditions during the Union's organization campaign violated Sec. 8(a)(1). The survey would reasonably tend to persuade employees that the Respondent was soliciting their grievances—indeed, the survey specifically inquired about employees' satisfaction with the handling of grievances—with an implicit promise to remedy them in order to counter the Union's campaign. We reach this conclusion regardless of whether the Respondent actually decided to circulate the survey before it knew about that campaign. The survey cannot be viewed as an existing benefit that the Respondent was obliged to maintain as if there were no union present. Furthermore, the Respondent offered no contemporaneous explanation of the survey's purpose that would have rebutted its reasonable tendency to interfere with employees' Sec. 7 rights.

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Part of this consolidated proceeding involves elections held in Case 12-RC-7957 in two separate employee bargaining units on May 31, 1996. One unit consists of certain classifications of employees of Respondent Villa Maria. The other unit consists of certain classifications of employees of Respondent Service Master Company (Service Master) who work at Respondent Villa Maria's facility.

The Union lost each election. Thereafter, it timely filed a single document entitled "Petitioner's Objections to Conduct Affecting Results of Election." The caption of this document identifies both Villa Maria and Service Master as "Employers." The introductory text preceding specific objections stated that the election was held "at the facility of Villa Maria Nursing and Rehabilitation Center and the Service Master Company (hereinafter 'Employer') in Miami, Florida." The objections themselves consistently refer to the "Employer" and the "election" while alleging conduct that, with one exception noted below, was also alleged in Case 12-CA-18137 as unfair labor practices committed by Villa Maria and Service Master. The Union served copies of the objections on both Villa Maria and Service Master.

Emphasizing the Union's repeated use of the singular for "election" and "Employer" and the parenthetical identification of "Employer" after the objections' introductory mention of Service Master, the judge concluded that the Union clearly intended to file objections only to the conduct of the Service Master unit election. Having found that Respondent Service Master committed no unfair labor practices, the judge recommended dismissal of the Union's objections and certification of the results of each election. In the alternative, in light of the possibility that the Board

might find that the Union objected as well to the conduct of the Villa Maria unit election, the judge conditionally recommended setting aside the results of that election based on the preelection unfair labor practices that he found Respondent Villa Maria had committed.[3]

The Union argues in cross-exceptions that the judge erred in finding that it failed to file valid objections to conduct affecting the results of the Villa Maria unit election. We agree. In contrast to the judge, we find that the Union's objections encompassed conduct allegedly affecting the same-day elections held in both units. Notwithstanding instances of arguably inartful or mistaken grammar, the Union named both Villa Maria and Service Master as "Employers" in the caption for its objections, timely served the objections on both Employers, alleged as objectionable conduct that corresponded directly to unfair labor practice charges filed against Villa Maria, and made these allegations while the joint employer status of the relationship between the two Employers remained in dispute.[4] Moreover, all the issues

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3. The judge also conditionally found merit in the Union's objection 6, which alleged violation of the written, preelection eligibility list requirements set forth in *Excelsior Underwear*, 156 NLRB 1236 (1966). (The Union withdrew this allegation as to Service Master at the hearing.) In light of our determination to set aside the Villa Maria unit election based on other objections, we find it unnecessary to pass on the *Excelsior* list objection for that election.

4. There are no exceptions to the judge's finding that Service Master and Villa Maria are not a joint employer of any unit employees working at the Villa Maria facility. Of the complaint allegations against Villa Maria that the judge recommended be dismissed, exceptions have been filed only to the dismissal of the allegation that the "Nurses' Week" celebration was unlawful.

were fully litigated in the consolidated hearing. Therefore, we find that the Union's election objections were sufficient to raise substantial and material issues concerning conduct affecting the Villa Maria unit election. We further find, in agreement with the judge's alternative reasoning, that the unfair labor practices committed by Villa Maria during the critical period constituted conduct that interfered with this election. This objectionable conduct requires setting aside the election and directing a new election for the Villa Maria unit.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Villa Maria Nursing and Rehabilitation Center, Inc., North Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election in the Villa Maria unit in Case 12-RC-7957 is set aside and the representation issue with respect to employees in the Villa Maria unit is severed from the rest of the case and remanded to the Regional Director to conduct a new election when she deems the circumstances permit the free choice of bargaining representative.

## DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among employees in the unit of Villa Maria employees found

appropriate, whenever the Regional Director for Region 12 deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by UNITE! Union of Needletrades, Industrial and Textile Employees, AFL-CIO/CLC.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

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Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of the Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots in the unit found appropriate of employees of The Service Master Company have not been cast for UNITE! Union of Needletrades, Industrial and Textile Employees, AFL-CIO/CLC and that it is not the exclusive representative of these bargaining unit employees.

Dated, Washington, D.C. September 26, 2001

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| Wilma B. Liebman | Member |
| John C. Truesdale | Member |

(SEAL) NATIONAL LABOR RELATIONS BOARD

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CHAIRMAN HURTGEN, concurring and dissenting in part.

The judge found that the Respondent engaged in conduct that violated Section 8(a)(1) and interfered with the election. Except as set forth below, I adopt the judge's findings and analysis.[1]

1. Section 10(b)

The judge found that the Respondent violated Section 8(a)(1) by unlawfully conferring benefits on employees in order to discourage their union activities. Specifically, the judge found that the Respondent unlawfully granted employees the benefits of a casual dress day (the first of which occurred on the date of the election), and cash prizes for winners of an essay contest.[2] In finding these violations, the judge rejected the Respondent's argument that these grant-of-benefit allegations were barred under Section 10(b) because no timely unfair labor practice charges had been filed which would support these allegations. For the following reasons, I agree with the judge.[3]

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1. I agree with my colleagues that it is unnecessary to pass on the judge's finding that the Respondent-Employer interfered with the election because the voter eligibility list it provided to the Region was deficient under the requirements of *Excelsior Underwear*, 156 NLRB 1236 (1966).

2. This casual-dress-day benefit was also found to be objectionable and one of the bases for setting aside the election.

3. However, I reject the judge's reliance on *Ross Stores, Inc.*, 329 NLRB 573 (1999), enf. denied in relevant part 235 F.3d 669, 672 (D.C. Cir. 2001). See my dissenting opinion in *Ross Stores*. See also my dissenting opinions in *Dico Tire, Inc.*, 330 NLRB No. 177 (2000); and *Tasty Baking Co.*, 330 NLRB No. 80 (2000).

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Under *Redd-I*, 290 NLRB 1115 (1988), otherwise untimely allegations will not be barred by Section 10(b) when they are closely related to timely filed unfair labor practice charges. In order to be "closely related" under *Redd-I*, the Board evaluates whether the otherwise untimely allegations: (1) involve the same legal theory and usually the same subsection of the Act as the timely filed charges; (2) arise from the same factual circumstances or sequence of events as the timely filed charge; and (3) whether a respondent would raise similar defenses to both allegations. Here, this test is met.

First, the legal theory and sections of the Act raised in the grant-of-benefit allegations are the same as those alleged in the original, timely filed unfair labor practice charge. That charge—which alleged 8(a)(1) and (3) violations—asserted that the Respondent had violated the Act "since on or about January 8, 1996, [when] Agents of the . . . [Respondent] . . . changed working conditions to thwart the Union drive." That allegation of "changed working conditions" is, on its face, broad enough to encompass allegations that the Respondent changed working conditions to the detriment of employees (e.g., reduced employee benefits) in violation of Section 8(a)(3), or changed working conditions for the better (e.g., granted employee benefits) in order to thwart the organizing drive, a violation of Section 8(a)(1).

Second, the grant-of-benefit allegations arise from the same factual circumstances as did the timely filed charge. Thus, all alleged unlawful changes in conditions occurred in the first 5 months of 1996, in response to the Union's efforts to organize the Respondent's employees.

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Finally, the Respondent would raise the same defense to the timely filed "change of working condition" allegation and the grant-of-benefit allegations. That is, the Respondent's defense would be that it did not change working conditions in order to discourage union support or activity.

On these bases, I find that, under *Redd-I*, the grant-of-benefit allegations are closely related to the timely filed charge and are not barred by Section 10(b).

2. Solicitation of grievances

About 2 months before the May 31, 1996 election, the Respondent distributed to its employees an "Employee Satisfaction Survey" wherein the Respondent sought their input on such issues as jobs, benefits, and supervision. The judge found that by distributing this survey, the Respondent violated Section 8(a)(1) by soliciting employee grievances and impliedly promising to remedy them in order to discourage union support and activity. In finding this violation, the judge rejected the Respondent's defense that it had approved the survey prior to the Union's organizing campaign. The judge concluded that even were this true—which he doubted—"Board law does not treat the solicitation of grievances in the same way that it treats the continuation of the payments of wages and other benefits" during an organizational campaign. I disagree with the judge in several respects, and would dismiss this allegation.

First, I find no record basis to support the judge's "doubt" that the Respondent had formulated its survey prior to the Union's organizing campaign. Indeed, the judge's own

findings are inconsistent with this observation. The Respondent's witness testified, without contradiction, that the Respondent had approved the "Employee Satisfaction Survey" on January 4, 1996, prior to the Union's organizing campaign. The fact that January 4 preceded the organizing campaign was supported by the judge's own conclusion that the "Union began to organize the employees of Villa Maria . . . on January 6, 1996." However, in questioning the Respondent's claim that the formulation of the survey predated the campaign, the judge relied on the fact that, before January 4, the Union had already begun visiting employees at their homes and organizing other facilities. In so doing, the judge cited neither claims nor evidence that the Respondent was aware of these earlier activities. Therefore, I find no record basis to support the judge's "doubt" concerning the Respondent's defense.

Next, I reject the judge's finding that, even were he to credit the Respondent's claim that the survey predated the organizing campaign, this defense lacks merit because a survey is not like predetermined wage or benefit changes that are to be continued during an organizational campaign. The judge cites no precedent for his conclusion, nor do I find any analytical basis to support it. Employers are required, during an organizational campaign, to act as they would have acted if there were no union on the scene. In my view this includes circulating an employee survey that it had prepared and decided to circulate before the organizing campaign began.[4]

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4. I recognize that if, in response to the survey, the employer thereafter offers benefits to employees during the critical period, the (Cont'd)

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Finally, I reject the judge's conclusion that the survey was unlawful because, by distributing it, the Respondent was inferentially promising to remedy employee grievances. It is well established that a "solicitation of grievances is not in and of itself an unfair labor practice." *Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1142 fn. 12 (3d Cir. 1977). "To listen to suggestion does not in and of itself imply that the suggestions will be acted on." *Visador Co.*, 245 NLRB 508 (1979). Nor does the use of opinion surveys per se violate Section 8(a)(1). *NLRB v. Tom Wood Pontiac*, 447 F.2d 383 (7th Cir. 1971). Section 8(a)(1) is violated only where the solicitation of grievances—be it by survey or otherwise—is accompanied by an implied or express promise to remedy those grievances which promise is aimed at interfering with, restraining or coercing employees in their organizational effort, or conditioned on the union losing the election. *NLRB v. K&K Gourmet Meats*, 640 F.2d 460, 466 (3d Cir. 1981). Here, I find that no such express or implied promise was made. In this regard, the overview accompanying the "Employee Satisfaction Survey" informed employees that the survey "was a tool to determine what you think about your job, pay, supervision, benefits and the organization in general." The overview further provided that "[y]ou will be informed of the results of the survey upon the tabulation of the completed answers." Nothing in the overview stated or implied that any changes would be made, or benefits granted, as a result of the survey. Nor did the survey itself state or imply that

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(Cont'd)
employer may be found to have violated the Act where those benefits are not a continuation of existing benefits or the conferral of benefits decided prior to the advent of the organizing campaign. However, that is not the case here.

changes would be made. The survey merely asked employees for their response to various employment-related questions. In these circumstances, I do not find it reasonable to infer that employees would view the survey as a promise by the Respondent to remedy employee concerns, conditioned on the Union losing the election, or to interfere with employees' support for the Union. I also believe that employer efforts to learn from employees can be a useful managerial tool. At least where they are adopted prior to a union campaign, I believe that the Board should be respectful of this tool.

Based on the above, I conclude that the Respondent's survey did not unlawfully *promise* a benefit. Nor was the survey itself an unlawful *grant* of a benefit. Assuming arguendo that the survey itself was a benefit, it was decided upon prior to the Respondent's knowledge of the campaign. Thus, the Respondent would likely have acted unlawfully if it had withdrawn the benefit when it learned of the campaign. In sum, the Respondent did what it was supposed to do; it carried out its plan as if there were no union campaign.

Finally, because the survey was not an improper grant of a benefit and because the employees would not reasonably view the survey as a solicitation of grievances and an implied promise to remedy them, I find no merit in my colleagues' reliance on the Respondent's failure to offer a contemporaneous explanation for its distribution of the survey.

Accordingly, I would dismiss this allegation.

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3. Threatened loss of benefits

Finally, I do not adopt the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees with a loss of benefits if they chose union representation. In this regard, I note that the complaint alleged that these threats were made by a labor consultant retained by the Respondent during the organizational campaign. In support of this allegation, employee Villa Louis testified that consultant John Davis made these threats at employee meetings and in one-on-one discussions with Louis. Crediting consultant Davis' denials, the judge found that neither Davis nor consultant Robert Mullen made such threats at employee meetings, and that Davis additionally did not make unlawful threats in one-on-one discussions. However, because he concluded that, as to the alleged one-on-one incidents, Louis really meant to testify that consultant Mullen, and not Davis, made those threats, the judge found a violation solely because the Respondent did not call Mullen to refute the allegations. The judge concluded that "because the one-on-one conversations were not denied by Mullen, *and only because of that*, I credit Louis' testimony and conclude that Villa Maria violated Section 8(a)(1) of the Act." (Emphasis added.) I find that this is not a sufficient basis on which to support a credibility determination.

In my view, the judge has piled inference upon inference. He inferred that Louis meant to name Mullen as the person making the threat. Although the inference may have been reasonable, it was an inference. Secondly, he inferred that, absent a denial from Mullen, the testimony of Louis (as to the substance of what was said) must be true. However, in

my view, since Louis never named Mullen, there was no point in calling Mullen to elicit a denial. In addition, I note that Louis was discredited in other respects and that Davis was expressly credited that neither he nor Mullen made unlawful threats attributed to them, in the employee meetings.

Finally, I reject my colleagues' argument that at issue is a pure credibility resolution that the Board should not set aside. If the judge had found that Louis' demeanor made her testimony credible, I would likely find the 8(a)(1) violation as to one-on-one incidents. However, where, as here, the judge has credited Louis *only* on the basis that Mullen did not testify, I find that there is an insufficient basis to uphold the judge's finding. As noted above, the failure to call Mullen was entirely explainable.

Accordingly, I would dismiss this allegation.

Dated, Washington, D.C. September 26, 2001

Peter J. Hurtgen Chairman

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NATIONAL LABOR RELATIONS BOARD

*Shelley B. Plass, Esq. (Jennifer Burgess-Solomon, Esq.)*, on the brief, for the General Counsel.

*Michael R. Miller, Esq. (Kunkel, Miller & Hament)*, of Tampa, Florida, for Respondent Villa Maria.

*Kelly O. Ludwick, Esq. (Seyfarth, Shaw, Fairweather & Geraldson)*, of Atlanta, Georgia, for Respondent Service Master.

*Ira J. Katz, Esq.*, of New York, New York, for the Union.

## DECISION

### FINDINGS OF FACT

BENJAMIN SCHLESINGER, Administrative Law Judge.

This case involves numerous allegations of surveillance, threats, solicitations, establishment of a new policy providing benefits to employees, and change in the employees' schedules, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as well as objections to the conduct of two Board-conducted representation elections held on May 31, 1996. Respondents Villa Maria Nursing and Rehabilitation Center, Inc. (Villa Maria) and The Service Master Company (Service Master) deny that they violated the Act in any manner.[1]

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1. The relevant docket entries are as follows: The charge in Case 12-CA-18137 was filed on June 17 and amended on August 29, 1996. The complaint issued on August 30, 1996. The hearing was held in Miami, Florida, on 5 days, between December 11, 1996, (Cont'd)

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Jurisdiction is conceded. Villa Maria, a Florida corporation with an office and place of business in North Miami, Florida, is a long-term care facility, a skilled nursing facility, a rehabilitation hospital, an outpatient center, an adult daycare center, and a home health agency. It is owned by the Archdiocese of Miami and managed by the Catholic Health Services (CHS). During the 12 months preceding the issuance of the complaint, it derived gross revenues in excess of $100,000 and purchased and received at its facility goods and materials valued in excess of $10,000 from other enterprises located within Florida, each of which other enterprises had received the goods and materials directly from points outside Florida. Service Master, organized under the laws of Delaware, with an office and place of business located at the Villa Maria facility in North Miami, has provided housekeeping and laundry services to Villa Maria. During the year preceding the issuance of the complaint, it purchased and received at its Florida facility goods and materials valued in excess of $50,000 directly from points located outside Florida. I conclude that Villa Maria and Service Master are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondents admit, that UNITE! Union of Needletrades, Industrial and Textile Employees, AFL-CIO/CLC (Union) is a labor organization within the meaning of Section 2(5) of the Act.

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(Cont'd)

and January 7, 1997. The administrative law judge who heard the case decided it on January 9, 1998. On June 28, 2000, the Board ordered on that the proceeding be remanded to a new administrative law judge; and in August 2000 the parties stipulated to waive a trial de novo.

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The Union began to organize the employees of Villa Maria, thinking that all in the facility were employed by Villa Maria, on January 6, 1996,[2] by distributing literature at each of the two vehicular entrances and the one pedestrian walkway to the employer's property. Two days later, the Union held an open house for employees at a nearby Howard Johnson to find out from them their interest in unionization, to distribute authorization cards, and to educate them on what the Union was about. The session was attended by about 10 to 15 persons, some of whom were employees of Service Master. As one of the union organizers was answering questions from the employees, a man, dressed not in uniform, like the employees, but in plain clothes, was walking around in the hallway for a while and then came into the room. He was greeted and given a union card to sign. The other employees turned around, saw him come in, and became quiet. They stopped asking questions. The organizers asked if there were any more questions, and no one raised a hand. There was silence. The meeting ended; and, as it did so, the employees were talking among themselves. One of the workers, Francena Sheffield, whispered to union organizer Cassandra Davis that the man who had walked into the room was one of Villa Maria's supervisors, George Saenz.

Saenz testified that he was not a supervisor and that he had been invited to the meeting, which he attended because he was curious. But the record demonstrates that he was a supervisor. In a memo dated September 15, 1995, George Miraglia, Villa Maria's director of engineering, announced to all employees of Saenz' promotion to engineering

2. All dates refer to the year 1996, unless otherwise stated.

supervisor, with congratulations, a fact that no doubt contributed to the employees' uniform understanding and belief that he was a supervisor. A year later, Villa Maria gave him a written appraisal, praising his abilities in accomplishing a series of supervisory functions during the preceding year, including his ability to make recommendations regarding terminations, training, promotions, and disciplines; to supervise schedules and participate in discussions for final dispositions; to plan work schedules and make job assignments; to provide training and in-service to employees; to instruct staff; to coordinate, schedule, and supervise repairs; to handle inventory; and to oversee the daily performance and ground care work of employees. Saenz gave orders to engineers and assisted with ensuring that the contracted security guards were doing what they should during the organizing drive. Indeed, in addition to the security guards, Saenz and Miraglia were the two Villa Maria employees who were responsible for security. Finally, Saenz received additional vacation time and punched the timeclock only once, rather than twice daily, as the other employees did.

Villa Maria contends that Saenz could not be a supervisor because there were only five full-time employees and one part-time employee in the department, making it unlikely that there would be two supervisors in the same department. However, Miraglia also was the director at another facility run by the CHS, Saint John's Nursing Center in Ft. Lauderdale, located about 45 minutes from Villa Maria, and he split his time between the two facilities, spending about 40 percent of his time at Saint John's. Therefore, for the time that he was away, without Saenz being a supervisor, the department would have lacked supervision. I find that

Saenz actually supervised employees and possessed ample authority of a supervisor and conclude that he is one. Regarding his supervisory status, I specifically reject Saenz' testimony, and that of George Miraglia, Saenz' supervisor and Villa Maria's director of engineering, and employee David Fleitas to the contrary. Saenz downplayed his functions in order to mislead about his supervisory duties.

Saenz' explanation that he signed an authorization card there because he was "caught off guard" and that he signed the card in a name not his own because he wanted to remain anonymous indicates that he did not want his identity to be proved at a later date, because it was obvious that he was well known at the facility. He was there to see what was going on and to report that fact to the representatives of Villa Maria. On his return to his job, he told Miraglia that he had been to the union meeting. Because the record demonstrates that Villa Maria was overly interested, albeit not in all instances illegally interested, as the complaint alleges, in what the employees were doing and because Saenz was not candid about his actions at the meeting,[3] I conclude that he attended the employees' meeting at the Howard Johnson to spy on their union activities on behalf of Villa Maria, in violation of Section 8(a)(1) of the Act.

The complaint alleges that this violation, as well as many others, were the responsibility of not only Villa Maria, Saenz' and Fleitas' employer, but also Service Master, which the complaint seeks to implicate as the joint employer of all the

3. I note Saenz' curious answer when asked if he reported any employee whom he saw speaking to a union representative or taking a flyer: "I was told it wasn't important."

employees at the premises. In *M.B. Sturgis, Inc.*, 331 NLRB No. 173, slip op. at 4 (2000), the Board held:

> [T]o establish that two . . . employers are joint employers, the entities must share or co-determine matters governing essential terms and conditions of employment. The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. [Citations omitted.]

Villa Maria and Service Master entered into a management services agreement on March 14, 1995, to provide housekeeping and laundry services to Villa Maria. The agreement provided that Service Master would "train, manage and direct" its employees to support the housekeeping and laundry departments of Villa Maria. Service Master was required to procure all required licenses and permits and to comply with all statutes and regulations necessary to the performance of its functions and to furnish management personnel and the necessary employees and supervisory, training, and technical personnel required to perform its functions. The General Counsel relies on such diverse provisions of the agreement that permitted Villa Maria to ask for the removal of any of Service Master's management personnel who are not acceptable to Villa Maria; that required Service Master to follow the appropriate disciplinary action policies and procedures regarding service workers who are "not acceptable" to Villa Maria; and that established a joint review committee of representatives of Villa Maria and Service Master to meet quarterly to review Service Master's performance under the agreement. The

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General Counsel also relies on the facts that Lawrence Stallcup, Service Master's director of environmental services, meets with Rutenberg on committees relating to resident care or department head meetings; that Rutenberg reports on activities scheduled at Villa Maria; that Joseph Charles had been employed at Villa Maria since 1974 as a porter/housekeeper/cleaner, but became an employee of Service Master in or around February 1995, after the contract between Villa Maria and Service Master was signed; that Miraglia, who is responsible for facility maintenance and security, instructed Service Master's employees about fire and life safety matters, such as how to open up an extinguisher, extinguish a fire, and ring the bell on the pull stations; and that Service Master's employees contacted him directly to report repairs that needed to be performed.

None of these prove that Villa Maria oversees the daily work or exercises indirect but effective control over Service Master's laundry and housekeeping employees. Further, the General Counsel has not shown, contrary to his contention, that Service Master did not have an assigned on-site supervisor performing the tasks of director of environmental services. The facts that Villa Maria ensures that the work performed by Service Master is adequate shows its control over Service Master, not Service Master's employees. The General Counsel contends that there were meetings of employees of both Villa Maria and Service Master regarding the Union, but there was no showing that the meetings were mandatory or that Villa Maria directed Service Master employees to attend. That is insufficient in meaningfully contradicting the otherwise separate functioning of the two entities. In fact, Stallcup conducted his own meetings with

the laundry and housekeeping employees in May 1996. The General Counsel's reliance on *Pacemaker Driver Service*, 269 NLRB 971 (1984), is misplaced. The findings in that decision show far more jointly exercised control than the minor facts present here. Villa Maria does not have any authority to hire, fire, suspend or otherwise discipline, transfer, promote or reward, or lay off or recall from layoff Service Master's employees. Villa Maria does not evaluate them or address their grievances. Service Master has no role regarding the security operations at Villa Maria, which alone contracted with West Florida Detective Service (Service) to provide security services at its facility. The guards are not agents of Service Master, as the Union contends. Accordingly, there being no allegations that Service Master independently violated the Act, except as derivatively engaged in by Villa Maria, I dismiss the entire complaint against Service Master.

The complaint alleges that Villa Maria also attempted to spy on another meeting of the employees at the Subway sandwich shop across the street from the facility. The union representatives met several times with employee-members of the organizing committee who reported what was occurring at the facility and delivered signed authorization cards. On one occasion (when was never stated), according to former employee Richard Brown, Jack Rutenberg, Villa Maria's administrator, having seen a union supporter heading in that direction, asked over the walkie-talkie for a volunteer to go to the Subway shop to watch over the employees' union activities. David Fleitas volunteered "to go over there and take down tag numbers of the people who was over there talking to the union people." Fleitas denied that, and Villa Maria generally attacks Brown's testimony on the ground

that it forced him to resign and that he was thus biased and prejudiced against it. Brown offered testimony to the Union, thus indicating that he might seek revenge for being asked to resign because of an incident that he felt was unjustified. On the other hand, Brown had no interest in the outcome of this proceeding; but I found his recollections exaggerated and inaccurate and pitched against Villa Maria, although I could not sense that he was not making a good-faith effort to testify as best as he believed he recalled. No matter whether I believe Brown, there is no evidence here that Fleitas actually followed through and looked at and copied the license plates. Accordingly, I dismiss this allegation.

The complaint alleges numerous other acts of surveillance, all of which involved watching union representatives distribute literature 2 or 3 days each week, at least at the beginning of the campaign, the number of days growing to every day by the time of the election, twice each day, in the morning from 6 through 7:30 a.m., and in the afternoon from 2 to 3:30 p.m. An employer's mere observation of open, public, union activity on or near its property does not constitute unlawful surveillance. *Fred'k Wallace & Son, Inc.*, 331 NLRB No. 113, slip op. at 1 and fn. 7 (2000); *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986). In the latter decision, supra at 568 fn. 5, the Board quoted one administrative law judge, "The notion that it is unlawful for a representative of management to station himself at a point on management's property to observe what is taking place at the plant gate is too absurd to warrant comment." *Tarrant Mfg. Co.*, 196 NLRB 794, 799 (1972). Thus, I dismiss the allegation involving Rutenberg, who is alleged to have watched the leafleting while he was smoking

at the front entrance of the facility, smoking being prohibited inside. I also dismiss the allegation involving Kimberly Pero, the director of nursing, who, Brown testified, was watching from the roof of the building. As a matter of law, that claim cannot stand. In addition, she denied that she ever had been on the roof, and I credit her denial. Pero could have looked out from any window to see what the Union organizers were doing without climbing up to the roof. Brown's testimony was baseless and his wavering between the fact that Pero was or was not on the roof and whether he heard her speak or did not was particularly unconvincing.

In dismissing these allegations, I deny Respondents' defense that no unfair labor practice charges were filed that would support various allegations of the complaint. The original charge, filed against both Respondents, alleged that they engaged in surveillance of employees as they received and distributed union literature, changed working conditions "to thwart the Union drive," threatened employees with loss of jobs and benefits if they supported the Union, solicited and remedied employees' grievances in an attempt to discourage membership in the Union, threatened employees that contract negotiations with the Union would inevitably lead to loss of jobs and benefits, and changed the employees' terms and conditions of employment by changing their work and pay schedules in order to discourage their support for the Union. The amended charge withdrew the allegations about the threat that negotiations would lead to strikes, the remedy of grievances, and the change of work and pay schedules.

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In considering the general sufficiency of a charge to support allegations of the complaint, the Board has generally held that a complaint is proper if the allegations are related to and arise out of the same factual situation as the conduct alleged to be unlawful in the underlying charge. Paragraphs 6(c), (g), and (h) allege surveillance; 6(d) and (I) allege threats of loss of employment and benefits; and 6(e) alleges solicitation of grievances, all in complete conformity with the amended charge. Paragraph 6(b) adds the name of Gloria Hanson to representatives of Respondents who allegedly threatened employees with loss of jobs and benefits; paragraph 6(f) alleges that Respondents established a new policy of casual days, designated a "CNA week" and gave parties with free food and drink, and held raffles with prizes, to discourage employees from voting for the Union; and paragraph 7 reinserted the allegation of a change of schedules that had been earlier withdrawn. As the Board stated in *Office Depot*, 330 NLRB No. 99, slip op. at 1 (2000):

> The Board stated in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), that in considering the sufficiency of a charge to support an allegation in the complaint under Section 10(b), "the Board has generally required that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge." To determine whether the complaint allegations are sufficiently related to the charge allegations, the Board applies a "closely related" test comprised of the following factors: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise

from the same factual circumstances or sequence of events; and (3) whether a respondent would raise similar defenses to the allegations. In *Ross Stores, Inc.*, 329 NLRB 573 (1999), the Board reaffirmed *Nickles Bakery* and other precedent consistently holding that the requisite factual relationship under the "closely related" test may be based on acts that arise out of the same antiunion campaign.[4]

3. See also *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

4. Although *Ross Stores* addressed the test for determining whether otherwise time-barred allegations in an amended charge relate back to allegations of an earlier timely filed charge, the same test applies to determining the relatedness of complaint allegations to an unfair labor practice charge. *Ross Stores*, 329 NLRB 573 fn. 6.

All the acts alleged occurred within the first 5 months of 1996 and were based on an overall plan to resist the union campaign. They thus arose from the same factual circumstances or series of events, meeting the Board's second test. Furthermore, Respondents' defense is similar in that they assert that they did not attempt to engage in acts that would discourage the union activities of their employees, a pattern that is alleged in the numerous 8(a)(1) violations alleged in the complaint. That leaves the first test, whether these acts involve the same theory as the acts alleged in the charge. Regarding the addition of Hanson as a person who also engaged in illegal surveillance, there can be no question. (The complaint as to her was dismissed during the hearing.) However, the remainder of the charges alleged acts which

were intended to scare the employees from their support of the Union, either by watching over them or by convincing them of the harm (loss of benefits and wages) that would result from their support. The new claim, that they were given new benefits, such as casual days and parties and raffles with prizes, is hardly different, because the natural result of those actions would also be intended to convince the employees to look elsewhere and not to the Union to support them. So closely are they related that the Board has often referred to them as the "carrot and stick," *Overnite Transportation Co.*, 329 NLRB 990 (1999), a device frequently used to thwart union activity. I conclude that the additional allegations are sufficiently related that they satisfy the basic *Nickles Bakery* test. To the extent that Villa Maria continues to maintain its 10(b) defense, which it did not brief, I reject it for the same reasons. Finally, I reject Villa Maria's defense that the complaint should be dismissed because the unfair labor practice charge was filed against "Villa Maria Rehab. Center." Villa Maria had to know that the charge was leveled against it and no other entity.

The remaining surveillance allegations concern the conduct of uniformed security guards, sometimes accompanied and supplemented by Miraglia and Saenz, who watched the leafleting. About six union representatives[4]

4. The witnesses' recollection of the number of organizers present varied widely. Brown recalled there being 10 or 20 or 30 or even 40, depending on the day. Cassandra Davis came closest to Brown's highest number, testifying that on one day there were probably 15. Organizer John Belizaire testified that there were no more than 8; Rutenberg testified that there were 6 to 12; and Pero and Mattie Reddick, human resources manager, testified that they saw 3 or 4.

began leafleting on January 6 in Villa Maria's parking lot, which was private property. Villa Maria's security guard asked them to leave, as did city police who were called when they did not, complaining that others had used the lot for solicitation. Eventually, the police told the representatives that they could not distribute from the parking lot, but had to go to the sidewalk and were not to block the driveway entrances. The representatives then went to cover the two driveway entrances to Villa Maria, as well as the pedestrian walkway. Despite union organizer Gihan Perera's initial claim that they remained on the sidewalk for the rest of the campaign, they did not stay where they should have. In fact, Perera conceded that "some people like volunteers who came out every once in a while stepped on the grass in order to line up on the sidewalk." He added: "There's a sidewalk and there's a grass. Sometimes, they would have 1 foot on the sidewalk and 1 foot on the grass." The union representatives were repeatedly told that they were not to be on Villa Maria property, and the police were called two to three times a week throughout the campaign, up to the day of the election. The police not only responded but also stayed, and it is probable that they would not have remained had the union representatives actually stayed where they were told to leaflet. Furthermore, had the local police not thought that the complaints had some basis, they would have refused to answer them after a period of time.

Villa Maria had concerns other than with trespass on its property. It also had to keep open access to its facility. Patients, staff members, family members, doctors, allied health professionals, and ambulances come to and leave from Villa Maria daily. One of the two driveways had a large

pothole and had been closed off for construction even before the Union started organizing and, when it was open during the campaign, the pothole was marked off by cones. On other occasions, it was closed, probably to limit the union activity or to maintain monitoring.[5] As a result, the traffic at the other driveway was doubled, and it was only predictable that there might be congestion in entering and leaving the property, which could only be exacerbated by the union representatives' distribution of leaflets, two on each side, and talking with employees for "couple of minutes," according to union organizer Richard Resua,[6] or for 3 to 5 minutes, according to Brown. To do so, the organizers would stop the vehicles by walking in front of them or holding their hand up. One tie-up was perhaps seven cars deep, and the backup of cars caused delays, particularly of critical traffic, such as doctors and ambulances.

Rutenberg's first response to the leafleting and trespass was to hire additional guards, two of whom, some employees said, were dressed in plain clothes. There was not credible

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5. For example, regarding the pothole and construction, Rutenberg testified that "It was blocked after May 31st for a little while. And then I'm not really sure why we took that chain down. It was either because construction was starting or it just wasn't necessary to keep such close monitoring on the three exits."

6. Resua, aware that Villa Maria was claiming that the Union interfered with the free flow of traffic, when asked for his estimation about how long he spoke to employees, initially answered: "The intent of the organizers was not to stop ingress and egress, so that the conversations were generally limited, but—" at which point there was an objection raised that his answer was not responsive.

corroboration on that issue, and I find that the ones in plain clothes, identified by the fact that they carried walkie-talkies, were probably Saenz and Miraglia, who carried that equipment and were advised by the guards each time the union representatives appeared. The guards who were hired, the ones from Service, wore uniforms. When the Union began its leafleting, Villa Maria employed only one security guard for each of its three shifts. Despite Rutenberg's testimony that on January 8, Villa Maria increased the number of guards to two per shift because there had been an incident where union personnel refused to leave, and after 2 or 3 days reverted to one security guard per shift, the security logs demonstrate that there were up to six security officers as "special reinforcements" present during one shift during the next 3 days. In addition, Rutenberg asked a guard to remain on duty after his normal shift on 2 days, as late as January 19, because Rutenberg was expecting "the Union people" to arrive; so that guard joined the guard coming on duty to monitor the leafleting.

Some of the General Counsel's witnesses testified that, as the campaign progressed, Villa Maria increased its contingent of security personnel stationed within sight of the distribution activity to two or three guards by April, and to four guards by May. However, Rutenberg testified that only in the 2 weeks prior to the election did he increase the number to two. Service's records do not support the General Counsel's witnesses' testimony about the April increases and about the number of guards hired in May. I thus find that Rutenberg's testimony about the number of guards in May was correct and the testimony of the witnesses for the General

Counsel, which varied greatly,[7] was inflated. But I also find that the two guards were frequently supplemented in May by Saenz and Miraglia, totaling four people watching the leafleting activities conducted by four union representatives.

The May increase was prompted, according to Rutenberg, by telephone threats made to two patients, graffiti (swastikas and "death to whitey"), desecration of a religious painting, cut cables and call bells, oil sprayed or glue pasted into a VCR, and death or other threats to himself, Miraglia, and Villa Maria's assistant director of nursing, Georgianna Barley. According to Brown, there had been no vandalism at Villa Maria prior to the union campaign. The General Counsel and the union contest these events, but there is corroboration from Brown that Rutenberg stated that he had been threatened, the police were called because of the threats to the patients, and Barley's compelling testimony about the threat to her. I also found convincing Rutenberg's testimony that he took his car out of town for a month because he felt that no one would think twice about damaging his car, which he "loved." I find, therefore, that what Rutenberg relied on occurred and that he hired additional guards in good faith.

The mere presence of a security guard does not constitute surveillance. *Seton Co.*, 332 NLRB No. 89 (2000). Villa Maria had the right to watch the union representatives to

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7. According to Cassandra Davis, in early February, the number of guards increased in early February from one to two, then later to three, and by late April into May to four. Sheffield stated that there were four or five guards in January; employee Villa Louis stated that there were four throughout 1996, and a few more plus the maintenance employees during the few weeks before the election.

ensure that they did not trespass on its property and that they did not block traffic. It also had the right to resort on a number of occasions to calling for police help in ensuring that its property rights would be honored. The placement of the guards halfway between the sidewalk and the building, approximately 25 feet away from the leafleting, does not appear to be obtrusive and is not unlawful. Because of the activity in May, Rutenberg had the right to hire additional security to protect the patients and staff, including himself, and Villa Maria's property.

Villa Maria, however, never explained the reason that so much time was spent by the security guards and Miraglia and Saenz watching the activities of the union representatives. Villa Maria's conduct went far beyond the "mere observation" permitted by *Hoschton Garment*. The guards engaged in continuous scrutiny. *Impact Industries*, 285 NLRB 5, 7 (1987); *Arthur Briggs, Inc.*, 265 NLRB 299 (1982), enfd. mem. 729 F.2d 1441 (2d Cir. 1983). Not only was there monitoring by one guard on patrol, as there had been prior to January 6, but the numbers increased dramatically, to six for 3 days beginning on January 8, and two for 2 days starting on January 18, and two guards, plus Miraglia and Saenz, for the 2 weeks in May before the election, when there were as many guards and security personnel watching the leafleting as there were union representatives doing the leafleting.

Villa Maria did not show that the increased number of personnel was necessary to ensure the protection of its residents or any of its property rights. The leafleting could have been observed from any window in the three-floor

facility that faced the front. The patients and property could have been protected from the inside of the facility. Rather than ordinary or casual observation, the increased number of guards, supplemented by Villa Maria's internal security staff, was intended to intimidate employees engaging in protected and union activities. *Epic Security Corp.*, 325 NLRB 772, 776-777 (1998); *Sands Hotel & Casino*, 306 NLRB 172 (1992), enfd. mem. sub nom. *S.J.P.R. Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993); *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982); and *Shrewsbury Nursing Home*, 227 NLRB 47, 50 (1976). Indeed, had Rutenberg been so concerned with vandalism and threats, one wonders why he did not permanently station the guards inside the building, where the damage was being done and the threats were being made.

In addition, the guards went far beyond merely watching the leafleting. Shortly after filing the petition for an election on April 22, the guards stood much closer to the union representatives, sometimes 6 feet away, sometimes 1 foot, despite the union representative's complaint that it was illegal for them to monitor the leafleting in that manner. They replied that they were just doing their jobs and doing what they had been told to do. Miraglia told a guard to keep an eye on those speaking with the union representatives and accepting union literature. They discussed names of employees and license tag numbers of their vehicles. Guards wrote on their clipboard after employees obtained literature. The day after the election, a security guard told Resua "that his job had simply been to write down the names and license plates of people who stopped to take Union literature or who spoke to organizers." Resua complained that it was objectionable conduct for them

to be writing names and license plate numbers of union supporters, and the guard responded that Resua did not have to worry because the guards already had a complete list of the union supporters. I conclude, from all the facts, that Villa Maria violated Section 8(a)(1) of the Act by engaging in surveillance.[8]

The complaint contains a number of allegations that Villa Maria solicited grievances, changed its conditions of employment, and threatened various adverse consequences to discourage its employees' support of the Union. About 2 months before the May 31 election, for the first time, Barbara Griffith, director of human resources, distributed satisfaction surveys to determine what the employees thought about their jobs, pay, supervision, and benefits, and asked that the employees answer three pages of questions. Included in the questions were the employees' satisfaction with how individual complaints and problems were handled, whether their coworkers were satisfied with working there, their interest in an alternative health plan, and their satisfaction with employee benefits and the salary administration program based on performance evaluations that generated salary increases. At the end of the survey the employees were asked to fill in a fourth page with any other thoughts that they had

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8. Villa Maria contends that a review of all of the reports of the security guards shows that they did not write the license plates of the employees and that the guards were required to note the license plates of every vehicle that made deliveries. Miraglia testified, however, the guards would write on a piece of paper the license plates of those coming into the facility to make deliveries. I find that the guards could just as easily, and did, write the license plate numbers on papers other than their official reports.

regarding their working environment, supervisor, compensation and benefits, recognition, and communication. Villa Maria defends this survey on the ground that it had been approved on January 4, prior to the Union's attempt to organize the employees. However, the Union started organizing the employees even earlier, in October 1995, albeit only by visits to the employees' homes, and the Union also began organizing the employees at other facilities owned by the Archdiocese.

It is well established that when an employer institutes a new practice of soliciting employee grievances during a union organizational campaign, "there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging his employees that the combined program of inquiry and correction will make union representation unnecessary." *Orbit Lightspeed Courier System*, 323 NLRB 380, 393 (1997); *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), citing *Reliance Electric Co.*, 191 NLRB 44, 46 (1971). I so conclude. Villa Maria's reliance on *Grove Valve & Regulator Co.*, 262 NLRB 285 (1982), is misplaced. There, the survey was distributed with the express notice, repeated twice, that the employer was, by distributing the survey, making no promise of any changes of employee wages, benefits, or working conditions. Even if Villa Maria had decided to issue the survey before it learned of the union campaign, a position that I doubt, Board law does not treat the solicitation of grievances in the same way that it treats the continuation of the payment of wages and other benefits. I reject, therefore, Villa Maria's reliance on *Churchill's Supermarkets*, 285 NLRB 138 (1987), enfd. 857 F.2d 1474 (6th Cir. 1988), cert. denied 490 U.S. 1046 (1989).

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On May 13, Barbara Griffith, the director of human resources of the CHS, announced a new rule permitting employees of Villa Maria to wear casual clothing, not their uniforms, the last Friday of each month. Villa Maria instituted that rule on Friday, May 31, the day of the election. There is nothing in the record that shows that wearing apparel was at all an issue among the employees, but permitting them to wear casual clothes, rather than their uniforms, was obviously not intended to make their working conditions more harsh. Rather, the logical intent was to make them feel good, and the change of the rule geared to the day of the election cannot be looked at as anything other than an effort by Villa Maria to encourage a vote against representation by the Union. I conclude that Villa Maria violated Section 8(a)(1) of the Act.

In 1995, all nurses, including certified nursing assistants (CNAs), celebrated a "nurses' week" during May. In 1996, Villa Maria divided that week into two weeks, one for the registered nurses and one exclusively for the CNAs, during which there was musical entertainment with a band and a disk jockey, food and drinks from Subway and Pizza Hut, raffles, and prizes awarded for dancing, including cash or gift certificates. The credible evidence, including the testimony of employee Villa Louis and Brown on cross-examination and the failure of the Counsel for the General Counsel to ask Sheffield, a longtime CNA, about this allegation, convinces me that the CNA week was celebrated in June, after the election, rather than in May, a fact on which the complaint is apparently predicated. There is nothing in the record that indicates when the separate CNA week was announced, if it was. Accordingly, I find that the mere

separation of the one-week celebration into two weeks, with the second week being held after the election, could not be understood as an attempt to dissuade employees from supporting the Union and conclude that there is no violation here.

However, on April 3, Villa Maria also announced a new essay contest, with monetary awards, one sponsored by the Florida Health Care Association for CNAs with 1 year of service. In addition, the CHS was to judge all entries, without regard to the length of service of an CNA, with separate cash awards from $75 to $150, with winners, according to the written announcement, to be announced on May 3, but, according to the testimony, to be given during the CNA week. The contest announced by the Florida Health Care Association is not subject to Villa Maria's control, and the announcement cannot constitute an unfair labor practice. However, Villa Maria's addition of its own award to CNAs was a new benefit intended to influence them in their choice in the election. I conclude that that violated Section 8(a)(1) of the Act. *Grove Valve & Regulator Co.*, supra.

The complaint alleges that Villa Maria changed employees' work schedules on or about January 9, an allegation supported by Louis, who testified that before the Union began its campaign, she was scheduled to work every other weekend, or twice a month, but after the union campaign began, Villa Maria required her to work three weekends each month, a schedule that continued until a month after the election, when she returned to working two weekends each month. Villa Maria's schedules demonstrate that Louis erred: her schedule changed in 1995, long before

the Union began to organize the employees. Sheffield's testimony appears to support Villa Maria's defense that the schedule change was made earlier. I dismiss this allegation.

The complaint also alleges that Villa Maria threatened employees with the loss of employment and benefits if they voted in the Union, an allegation supported by Sheffield, who testified that at a meeting on January 8, Rutenberg told all the employees of both Villa Maria and Service Master that, if they signed papers concerning the Union, they "would" lose their pension and their homes. I discredit her testimony for several reasons. First, I found that she generally exaggerated. Second, I found that, although she remembered these statements, she could remember little else of all the meetings that she attended, claiming that "it's been so long, I don't remember." Third, during cross-examination, she changed her testimony from "would" to "could." Fourth, despite the fact that the meeting was attended by more than 150 employees, Sheffield was the only one who testified that she heard these remarks. Finally, Rutenberg testified that he informed the employees that in collective bargaining everything goes on the table and that what the employees have now does not mean that that would be what they would have after the Union and management reached a contract. Their conditions might be better, worse, or the same. Furthermore, in discussing the possibility of strikes, he mentioned that when employees strike, some unions pay strike benefits that are not a lot of money. He asked whether those benefits would be sufficient for employees to make their house and car payments. From those remarks, Sheffield may have thought that Rutenberg was making a threat, but he was not. I dismiss this allegation.

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A number of allegations concern two labor consultants, John Davis and Robert Mullen, retained by both Villa Maria and Service Master. Louis testified that, about 2 weeks before the election, at a meeting conducted by them, the person she identified as John said that, if the employees joined the Union, they were going to lose their benefits, such as their pension plan, and Villa Maria would reduce their days and hours. Furthermore, if the employees paid $10 every month to the Union, the Union would not "do any good for you, because they always rent, using rent car. They always living in the hotel. They get our, they going to get our money to pay their bills." Finally, in two one-on-one conversations within 2 or 3 weeks of the election, "John" also threatened that Villa Maria would reduce the employees' vacations from 2 weeks to 1 and their holidays from 8 days to 4. Louis testified that the two consultants were both tall and that John was white and was a member of the Union (she "used to call him to come in to help us") when she was working at Bayshore Convalescent Center and Bob was black. In reality, she had their skin colors reversed, and Davis denied ever hearing of Bayshore and denied that he had made the statements that obviously were being attributed to the white Mullen, who Davis testified was previously a union organizer in a union that represented nursing home employees and who did not testify.

The General Counsel asks that I draw an adverse inference from Mullen's failure to testify, and I will do so. Villa Maria clearly knew that it was Mullen that Louis was testifying about but tried to take advantage of her mistake in calling him "John." I find that Davis was the more credible witness and credit his denial that neither he nor Mullen made

the comments attributed to them at the meeting. However, because the one-on-one conversations were not denied by Mullen, and only because of that, I credit Louis' testimony and conclude that Villa Maria violated Section 8(a)(1) of the Act. I specifically do not credit her testimony, supporting an allegation that admittedly was not made in the complaint, that Human Resources Manager Mattie Reddick promised that if the Union did not win the election, the employees would get everything they needed. Reddick denied making that statement and Louis admitted that Reddick talked to the employees about the benefits that they already had without a union and said that they could do just as well without a union as with a union.

Finally Joseph Charles, an employee of Service Master, testified that at a meeting about 2 weeks before the election Davis or Mullen told the Service Master employees that they would have no benefits if they voted for the Union. The counsel for the General Counsel represented that she had called Joseph as a witness to testify about Saenz' duties as a supervisor. There was no allegation in the complaint against Service Master about this incident, and I find that it was not fully litigated, in light of counsel's representation. Similarly, I will not consider Brown's testimony that Mullen told Service Master employee Jeff Worthy that Sheffield tricked people into signing union membership cards and that people lost jobs working in a union. I find that this was not alleged and not litigated.

*Appendix C*

The Objections

On April 22, the Union filed a representation petition for an election naming both Respondents as the Employer. On May 8, 1996, the Regional Director for Region 12 approved a Stipulated Eection Agreement for Villa Maria employees in the following unit:

> All full-time and regular part-time employees employed by Villa Maria Nursing and Rehabilitation Center, Inc. (Villa Maria), in the following classifications: CNAs, Restorative CNAs, Unit Clerks, Health Information Management (Medical Records) Clerks, Engineering (Maintenance) employees, Patient Representatives (Admission Clerks), Purchasing Assistant, Pharmacy Drivers, Recreation Therapy Assistants, and Dietary employees (including cooks), employed by Villa Maria at its facility located at 1050 NE 125th Street, Miami, Florida; *excluding* all employees, housekeeping, office clerical employees, LPNs, RNs, professional and technical employees, guards and supervisors as defined in the Act.

On the same date the Regional Director approved a Stipulated Election Agreement for Service Master employees in the following unit:

> All full-time and regular part-time housekeeping and laundry employees employed by The Service Master Company at Villa Maria Nursing and

*Appendix C*

> Rehabilitation Center, Inc., at 1050 NE 125th Street, North Miami, Florida; excluding all other employees, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

Separate elections were conducted on May 31, 1996. The Union lost in the Villa Maria unit, with 59 votes cast for it, 65 votes cast against, and 6 challenged ballots, which were insufficient to change the results of the election. The Union also lost the Service Master unit, 15 to 8. On June 7, 1996, the Union, by one of its attorneys, timely filed objections, which essentially complain about the same alleged in the complaint. In the caption named both Respondents are named and referred to as "Employers." However, the objections were titled "Petitioner's Objections to Conduct Affecting Results of Election." There is no reference to two elections being held. Rather, only the singular "Election" is referred to, not the plural "Elections." Thus, the objections end with the prayer "that the election be set aside and a new election held at the earliest possible date and time."

In the body of the objections, the title of the objections, quoted above, is repeated, with the modification that the "election" was held "at the facility of Villa Maria Nursing and Rehabilitation Center and The Service Master Company in Miami, Florida (hereinafter 'Employer')." "Employer" clearly is intended to refer to Service Master and not both Respondents, because the word is used repeatedly only in the singular. The reference is not "(hereinafter collectively 'Employer')." The only evidence that would at all show that the Union intended to object to the conduct of Villa Maria

was the fact that, at least according to the Regional Director's order directing a hearing on the objections, the Union served the objections on both Respondents. However, that may have been merely a courtesy mailing of copies on all parties to these proceedings and does not vary the language of the objections that the Union filed. Accordingly, I conclude that the only valid objections served were those on Service Master, and the only objection that was not also an unfair labor practice allegation was that Service Master gave to the Union an incorrect *Excelsior*[9] list, an objection that was withdrawn at the hearing. Accordingly, because I conclude that there is no proof that Service Master violated the Act, I conclude that the objections have no merit and remand Case 12-RC-7957 to the Regional Director for Region 12 for further action.

In the event, however, that the Board should find that the objections were validly filed against Villa Maria, some of the unfair labor practices that I have found occurred before the filing of the petition and do not constitute objectionable conduct. The announcement of the new casual day, the surveillance in May, and the threats by Mullen to Louis occurred between the filing of the petition and the election and constituted conduct which interfered with the election, requiring the scheduling of a new election for the Villa Maria unit. In addition, the Union contends that 13 of the 147 addresses contained on Villa Maria's *Excelsior* list were inaccurate. Villa Maria Administrative Assistant Glennis Wallace testified that she compared the addresses with Villa Maria's records and that nine were consistent with Villa

9. *Excelsior Underwear*, 156 NLRB 1236 (1966).

Maria's records (the Union found one of these employees), one contained a typographical error, and three contained the addresses of other employees. In sum, Villa Maria submitted a list with four mistakes of its own. That is less than 3 percent, far less than the 7 percent that the Board found not objectionable in *Bear Truss, Inc.*, 325 NLRB 1162 (1998). I dismiss this objection.

In doing so, I note the Board's recent decision in *Woodman's Food Markets*, 332 NLRB No. 48 (2000), which involved the omission of 12 eligible employees from the *Excelsior* list where the union lost the election by 13 votes. The Board reconfirmed that "employees have a Section 7 right to make a 'fully-informed' choice in an election, and . . . the purpose of the Excelsior rule is to protect that right," quoting from *Thiele Industries*, 325 NLRB 1122 (1998), and held that:

> in determining whether an employer has substantially complied with the *Excelsior* requirements, the Board must consider not only the number of names omitted from the *Excelsior* list as a percentage of the electorate, but also other factors, including the potential prejudicial effect on the election as reflected by whether the omissions involve a determinative number of voters and the employer's reasons for omitting the names.

The Board specifically, at footnote 11, did "not reach . . . whether the policy adopted . . . with respect to the omission of names should also apply to incorrect addresses."

Because the Board did not reach that issue, which is the issue presented here, I am bound by current Board law. However, just as in *Woodman's Food Markets*, the votes of the employees with bad addresses could have made a difference. If all the challenged employees voted for the Union, the election would have been tied, 65 votes for union representation and 65 votes against. Thus, consistent with the remedy afforded in *Woodman's Food Markets*, the matter might have to be returned to the Regional Director for determination of the challenged ballots; and, if their votes, or the votes of some of them were opened and it was determined that the Union lost by three votes, then Villa Maria's objection would be sustained and the election would be set aside.

In addition, the Board has held that a finding of bad faith will preclude a finding that an employer was in substantial compliance with the *Excelsior* rule. *Bear Truss, Inc.*, 325 NLRB at 1162 fn. 3. The Union advised the Board of the bad addresses, and the Board agent called back giving the Union the addresses that Villa Maria had given him. Why the errors that were testified to by Villa Maria at the hearing could not have been determined when the Union complained was not explained and evidences Villa Maria's bad faith. *Medtrans*, 326 NLRB 925 (1998).

REMEDY

Having found that Villa Maria has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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On these findings of fact and conclusions of law and on the entire record,[10] I issue the following recommended[11]

ORDER

The Respondent, Villa Maria Nursing and Rehabilitation Center, Inc., North Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of its employees engaged in union and concerted protected activities.

(b) Threatening its employees with loss of benefits if they voted in UNITE! Union of Needletrades, Industrial and Textile Employees, AFL_CIO/CLC (Union).

(c) Soliciting complaints and grievances from its employee through surveys.

(d) Establishing new benefits, such as casual days and prizes, to discourage its employees from voting for or supporting the Union.

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10. The Union's motion to correct the reference in the official transcript to the year "1992" to "1996" on p. 523 is granted, without opposition.

11. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in North Miami, Florida, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Villa Maria's authorized representative, shall be posted by Villa Maria immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Villa Maria to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Villa Maria has gone out of business or closed the facility involved in these proceedings, Villa Maria shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Villa Maria at any time since January 8, 1996.

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12. If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint against Villa Maria is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the complaint against The Service Master Company is dismissed in its entirety. Dated, Washington, D.C. January 5, 2001

*Appendix C*

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in surveillance of our employees engaged in union and concerted protected activities.

WE WILL NOT threaten our employees with loss of benefits if they voted in UNITE! Union of Needletrades, Industrial and Textile Employees, AFL-CIO/CLC.

WE WILL NOT solicit complaints and grievances from our employee through surveys.

WE WILL NOT establish new benefits, such as casual days and prizes, to discourage our employees from voting for or supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

VILLA MARIA NURSING AND
REHABILITATION CENTER, INC.

Supreme Court, U.S.
FILED
FEB 10 2003
OFFICE OF THE CLERK

No. 02-878

# In the Supreme Court of the United States

VILLA MARIA NURSING AND REHABILITATION CENTER, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that it lacked jurisdiction to review the National Labor Relations Board's order in this case insofar as the Board directed that a new election be held among petitioner's employees.

2. Whether substantial evidence supports the Board's finding that petitioner committed unfair labor practices during the union's organizing campaign.

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# In the Supreme Court of the United States

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VILLA MARIA NURSING AND REHABILITATION CENTER, INC., PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-2a, 3a-4a) are not published in the *Federal Reporter*, but the judgment is noted at 49 Fed. Appx. 289 (Table). The decision and order of the National Labor Relations Board (Pet. App. 5a-19a), and the decision of the administrative law judge (Pet. App. 20a-54a), are reported at 335 N.L.R.B. No. 99.

### JURISDICTION

The judgment of the court of appeals was entered on September 12, 2002. The petition for a writ of certiorari was filed on December 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner operates a rehabilitation hospital and related health-care facilities in North Miami, Florida. Pet. App. 21a. Service Master Company (Service Master) provides petitioner with housekeeping and laundry services. *Ibid.* In January 1996, the Union[1] began an organizing campaign among workers at petitioner's premises and, on April 22, 1996, filed a representation petition with the National Labor Relations Board (Board) seeking an election. *Id.* at 22a, 46a. On May 31, 1996, Region 12 of the Board conducted separate elections in two bargaining units, one comprised of petitioner's employees and the other comprised of Service Master's employees who worked at petitioner's premises. The Union lost both elections. *Id.* at 7a, 46a-47a. Subsequently, the Union filed election objections and unfair labor practice charges with the Board. *Id.* at 7a, 20a n.1, 47a.

2. On August 30, 1996, acting on the Union's unfair labor practice charges, the Board's General Counsel issued a complaint alleging that petitioner and Service Master had violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), during the organizing campaign. Pet. App. 20a & n.1.[2] The Union's election objections in the representation proceeding were premised on essentially the same conduct alleged in the General Counsel's unfair labor practice

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[1] UNITE! Union of Needletrades, Industrial and Textile Employees, AFL-CIO.

[2] Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, among which is the right "to form, join, or assist labor organizations," 29 U.S.C. 157.

complaint. *Id.* at 7a, 47a. The representation and unfair labor practice proceedings were therefore consolidated before an administrative law judge (ALJ). *Id.* at 7a, 20a.

After a hearing, the ALJ found that petitioner had committed multiple violations of Section 8(a)(1) during the Union's organizing campaign. Pet. App. 20a-45a, 50a-54a. Among other things, the ALJ found that: (i) in May 1996, the month of the election, additional security guards hired by petitioner engaged in unlawful surveillance of employees who spoke with union representatives and accepted union literature (*id.* at 37a-39a); (ii) two or three weeks before the election, a labor consultant retained by petitioner threatened an employee that petitioner would reduce employees' vacations and holidays if the Union won the election (*id.* at 44a-45a); and (iii) petitioner announced a new casual dress policy about two weeks before the election and implemented the policy on the day of the election to encourage employees to vote against the Union (*id.* at 41a).[3] The ALJ found that Service Master did not violate the Act and dismissed the complaint as to it. *Id.* at 8a n.4, 25a-27a, 53a.

The ALJ then turned to the Union's election objections. Pet. App. 46a-50a. Initially, the ALJ found that the Union's election objections document, styled "Objections to Conduct Affecting Results of Election,"

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[3] The ALJ further found that: (i) shortly after the union organizing campaign began, petitioner's engineering supervisor attended a union meeting at a local hotel to "spy" on employee union activity (Pet. App. 22a, 24a); and (ii) about two months before the election, petitioner distributed "satisfaction surveys" to solicit and resolve employee grievances, and began an essay contest with cash awards, in order to encourage employees to vote against the Union (*id.* at 39a-40a, 42a).

raised objections only to the conduct of Service Master, not petitioner. *Id.* at 47a-48a. The ALJ concluded that those objections lacked merit because Service Master had not violated the Act or engaged in other objectionable conduct during the organizing campaign. *Ibid.*

The ALJ ruled in the alternative, however, that if the Board were to construe the Union's document as raising objections to petitioner's actions in addition to Service Master's actions, the three Section 8(a)(1) violations committed by petitioner that are described above "constituted conduct which interfered with the election, requiring the scheduling of a new election for the Villa Maria [*i.e.*, petitioner's] unit." Pet. App. 48a.

3. Petitioner filed exceptions to the ALJ's decision with the Board, and the Union filed cross-exceptions. Pet. App. 5a. The Board (with one member dissenting in part) rejected petitioner's exceptions and affirmed the ALJ's unfair labor practice findings under Section 8(a)(1). *Id.* at 5a-6a & nn.1-2. To remedy those violations, the Board entered a cease and desist order and directed petitioner to post a notice. *Id.* at 9a, 51a-52a.

In its cross-exceptions, the Union challenged the ALJ's finding that it did not file election objections against petitioner. Pet. App. 8a & n.4; see *id.* at 11a. The Board unanimously sustained the Union's cross-exceptions and reversed in part the ALJ's rulings on the Union's election objections. *Id.* at 7a-9a. The Board found that the Union's election objections were "sufficient to raise substantial and material issues concerning [petitioner's] conduct." *Id.* at 9a. The Board explained that, despite "instances of arguably inartful or mistaken grammar," the Union named both petitioner and Service Master as "employers" in the caption of its objections, timely served its objections on petitioner, and alleged objectionable conduct that "cor-

responded directly" to the unfair labor practice allegations in the General Counsel's complaint against petitioner. *Id.* at 7a, 8a. The Board further noted that "all the issues were fully litigated in the consolidated hearing" before the ALJ. *Id.* at 8a-9a.

On the merits, the Board affirmed the ALJ's alternative ruling that certain of petitioner's unfair labor practices constituted objectionable conduct that "require[d] setting aside the election and directing a new election for the Villa Maria unit." Pet. App. 9a. The Board therefore severed "the representation issue with respect to employees in the Villa Maria unit * * * from the rest of the case," and remanded to the Regional Director "to conduct a new election when she deems the circumstances permit the free choice of bargaining representative." *Ibid.*

4. The Board filed an application in the court of appeals for enforcement of its order, and petitioner filed a cross-petition for review. Pet. App. 3a-4a.

a. The court of appeals, acting *sua sponte*, directed the parties to brief the question whether the court possessed jurisdiction to review the Board's order insofar as the Board had directed a new election among petitioner's employees. See Pet. 6. Following briefing on the question, the court issued an order agreeing with the Board that it lacked jurisdiction over petitioner's appeal to the extent that petitioner challenged "the Board's direction to conduct a new election for certain employees." Pet. App. 4a. The court further concluded (in agreement with the Board) that it possessed jurisdiction to consider petitioner's challenge to "the portion of the Board's * * * order that adopted the Administrative Law Judge's finding as to unfair labor practices." *Ibid.*

b. On the merits, the court of appeals enforced the Board's unfair labor practice determinations in an unpublished *per curiam* opinion. Pet. App. 1a-2a. The court held that "[t]he findings of fact relied on by the Board in concluding that [petitioner] violated Section 8(a)(1) of the [Act] * * * are supported by substantial evidence, and the principles of law applied by the Board to those facts are well settled." *Id.* at 2a.

## ARGUMENT

1. Petitioner contends (Pet. 8-13) that the court of appeals erred in concluding that it lacked jurisdiction to review the Board's decision to direct a new election. That contention lacks merit and does not warrant review.

a. It is well settled that a party (such as petitioner) that disagrees with a decision of the Board in a representation proceeding generally cannot obtain direct review of that decision in the federal courts. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964). That principle applies to a Board decision to hold a new election in a bargaining unit of employees. See *NLRB* v. *International Bhd. of Elec. Workers*, 308 U.S. 413, 414-415 (1940); *National By-Prods., Inc.* v. *NLRB*, 931 F.2d 445, 448 n.1 (7th Cir. 1991); *NLRB* v. *Carl Weissman & Sons, Inc.*, 849 F.2d 449 (9th Cir. 1988). To obtain judicial review of a Board representation decision, the party seeking review must first commit a pertinent unfair labor practice. *Boire*, 376 U.S. at 477; *AFL* v. *NLRB*, 308 U.S. 401, 409 (1940). In the case of an employer, the pertinent unfair labor practice is a refusal to bargain with the union that has been certified by the Board as the representative of its employees. Upon entry of a final order by the Board in a refusal-to-bargain unfair labor practice proceeding, the aggrieved

employer may then obtain judicial review of the underlying representation decision by filing a petition for review of the Board's final order in a court of appeals. See 29 U.S.C. 159(d), 160(f); *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 139-140 (1971) (employer refuses to bargain with union to obtain judicial review of Board's definition of appropriate bargaining unit); *Boire*, 376 U.S. at 477 (same).

In this case, the Board consolidated a representation proceeding with an unfair labor practice proceeding, entered a final order finding that petitioner had committed unfair labor practices during a union organizing campaign, and directed that a new election be held among petitioner's employees. The Board thus has *not* issued a final order requiring petitioner to bargain with the Union as the representative of its employees. Rather, the final order entered by the Board only requires petitioner to cease and desist from committing specified unfair labor practices (such as engaging in unlawful surveillance of employee union activity) and to post a notice. See Pet. App. 9a, 51a-52a. Whether the Board will issue petitioner a final bargaining order in the future depends on the outcome of the new election directed by the Board.

In such circumstances, the courts of appeals have uniformly held that, although the representation and unfair labor practice proceedings were consolidated at the administrative level, the courts lack jurisdiction to review the Board's decision to direct a new election and possess jurisdiction only to review the Board's final order finding that the employer committed unfair labor practices during the union organizing campaign. See, *e.g.*, *Adtranz ABB Daimler-Benz Transp., Inc.* v. *NLRB*, 253 F.3d 19, 24-25 (D.C. Cir. 2001); *NLRB* v. *Webcor Packaging, Inc.*, 118 F.3d 1115, 1124-1125 (6th

Cir. 1997), cert. denied, 522 U.S. 1108 (1998); *NLRB* v. *Pizza Crust Co.*, 862 F.2d 49, 50 (3d Cir. 1988); *Raley's, Inc.* v. *NLRB*, 725 F.2d 1204, 1205-1206 (9th Cir. 1984) (en banc); *Custom Recovery, Div. of Keystone Res., Inc.* v. *NLRB*, 597 F.2d 1041, 1046 (5th Cir. 1979). As one court of appeals has explained, "[t]he consolidation of the representation and unfair labor practice cases by the Board here cannot * * * confer jurisdiction upon th[e] court to review the orders in the representation proceeding now when no such jurisdiction exists under the governing statute." *Daniel Constr. Co.* v. *NLRB*, 341 F.2d 805, 809 (4th Cir.), cert. denied, 382 U.S. 831 (1965).

Here, the court of appeals properly invoked that uniform line of precedent to hold that it lacked jurisdiction to consider petitioner's "appeal" insofar as petitioner challenged "the Board's direction to conduct a new election" for the employees in petitioner's bargaining unit. Pet. App. 4a (citing *Custom Recovery*, *supra*). The court of appeals' straightforward application of settled jurisdictional principles raises no issue warranting this Court's review.

b. Petitioner contends (Pet. 10-11) that this Court's review is necessary to determine whether a court of appeals would possess jurisdiction to review a decision by the Board to hold a new election if, on review of the Board's final order in an unfair labor practice proceeding, the court were to *reject* the unfair labor practice findings that served as the predicate for the Board's decision to set aside the initial election. That question, however, is not presented by this case. The court of appeals did not reject, but rather *upheld*, the Board's unfair labor practice findings that served as the basis for the Board's decision to set aside the election held among petitioner's employees and to direct a new

election. See Pet. App. 2a. This case thus does not present the hypothetical issue raised by petitioner.[4]

Petitioner also suggests (Pet. 9) that the court of appeals should have exercised jurisdiction over the Board's decision to direct a new election because, by consolidating the representation and unfair labor practice proceedings at the administrative level, the Board has "chosen to treat the two cases as inextricably linked for all purposes," including for the purpose of judicial review. That contention, for which petitioner cites no authority, is flatly contradicted by the uniform line of decisions holding that there is no jurisdiction in the circumstances of this case to review the Board's decision directing a new election. See pp. 7-8, *supra*.

c. Petitioner asserts (Pet. 11-12) that the Board violated Section 10(c) of the Act, 29 U.S.C. 160(c), by reviewing the ALJ's ruling that the Union had lodged election objections only against Service Master, and that the court of appeals condoned that violation when it concluded that it lacked jurisdiction to review the Board's decision in the representation proceeding. Petitioner may obtain judicial review of its claim, however, at such time as the new election ordered by the

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[4] Petitioner relies (Pet. 10-11) on the dissenting opinion in *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d 534, 543-549 (3d Cir. 1983) (Garth, J., dissenting). That dissenting opinion makes clear, however, that the courts of appeals lack jurisdiction to review a Board decision to direct a new election when, as here, "an election has been held, the Board has found the election to be tainted, and the 'taint' (unfair labor practices) found by the Board, *has been upheld* on court review." *Id.* at 545. In that situation, the Board's direction of a new election "can only be reviewed after the company has committed the unfair labor practice of refusing to bargain with a certified bargaining agent." *Id.* at 546.

Board has been held and the Board has ordered petitioner to bargain with the Union.

Petitioner's claim lacks merit in any event. Contrary to petitioner's argument (Pet. 11), the ALJ's ruling did not "automatically" become "the order of the Board" under the "plain language" of Section 10(c). Section 10(c) states that the decision of an ALJ "shall become the order of the Board" only "if no exceptions are filed." Here, the Union filed cross-exceptions to the ALJ's ruling that the Union had lodged election objections only against Service Master. See Pet. App. 5a, 7a-8a; 29 C.F.R. 102.69(f) (proviso); 29 C.F.R. 102.46(e).[5]

Petitioner also suggests (Pet. 13-14) that the court of appeals possessed jurisdiction because the Board's finding in its representation decision that the Union had filed objections against both petitioner and Service Master had the effect of denying petitioner notice and a meaningful opportunity to respond to the Union's allegations, in violation of petitioner's due process rights. Petitioner, however, identifies no authority for an exception to the bar against direct judicial review by a court of appeals of Board representation decisions when the challenging party asserts a due process violation. Petitioner, in any event, was not denied a "meaningful opportunity to prepare its defense" (Pet. 14) at the consolidated hearing before the ALJ. Nothing in the consolidated hearing procedures prejudiced petitioner in the full and fair litigation of its two defenses: (i) that

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[5] 29 C.F.R. 102.69(f) (proviso) states that, when, as here, a representation case has been consolidated "with an unfair labor practice case for purposes of hearing," the filing of exceptions to the ALJ's decision is governed by 29 C.F.R. 102.46(e). That Board rule, in turn, provides that "[a]ny party who has not previously filed exceptions may * * * file cross-exceptions to any portion of the [ALJ's] decision."

the General Counsel's complaint lacked factual and legal merit; and (ii) that the Union had not properly filed election objections against petitioner. See Pet. App. 22a-48a (addressing evidence and argument proffered by petitioner as to both defenses).

2. Petitioner argues (Pet. 14-18) that the court of appeals erred in concluding that substantial record evidence supports the Board's finding that petitioner committed violations of Section 8(a)(1) during the Union's organizing campaign. That fact-bound contention does not warrant this Court's review. As the Court has explained: "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

There is no merit to petitioner's suggestion (Pet. 14) that the brevity of the court of appeals' opinion demonstrates that the court engaged in a "rubber stamp" review of the Board's order with "no substantive rationale for the result reached." The court of appeals enforced the Board's order on the explicit ground that, "[u]pon consideration of the record in the light of the parties' briefs in this case," the court was satisfied that "[t]he findings of fact relied on by the Board in concluding that [petitioner] violated Section 8(a)(1) of the [Act] are supported by substantial evidence" and "the principles of law applied by the Board to those facts are well settled." Pet. App. 2a; see *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) ("courts of appeals should have wide latitude in their decisions of whether or how to write opinions" and that

"is especially true with respect to summary affirmances").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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